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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BILLY MORIAH NORBURY, Defendant and Appellant.	A137324 (Mendocino County Super. Ct. No. SCUKCRCR122031202)

After a jury trial, defendant Billy Moriah Norbury was found guilty of first-degree murder of Jamal Andrews. (Pen. Code, §§ 187, subd. (a), 189.)[1] The jury also found true an allegation that during the commission of the murder defendant intentionally and personally discharged a firearm that caused the death of the victim, who was not an accomplice (§ 12022.53, subd. (d)). After a separate trial, the jury found defendant was not legally insane at the time of the commission of the murder. The court sentenced defendant to an aggregate term of 50 years to life, consisting of 25 years to life for the first-degree murder conviction, plus 25 years to life for the firearm-use sentence enhancement.

The prosecution argued before the jury that defendant was guilty of first-degree murder under two theories – premeditation and deliberation (§187, subd. (a)), or "perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death" (§ 189). In seeking

[1] All further unspecified statutory references are to the Penal Code.

reversal of his first-degree murder conviction, defendant contends the trial court committed prejudicial error by advising the jury that the term "motor vehicle," as that term is used in section 189, includes a motorized all terrain vehicle. We disagree, and hold that the jury instruction is a correct statement of the law. We also conclude defendant's other claims of error do not require reversal. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The charges against defendant arose from an incident that took place on the evening of January 24, 2012, when defendant fired several rifle shots at the victim who was outside the victim's residence. The victim was mortally wounded and defendant was charged with first-degree murder, together with a related firearm-use sentence enhancement. Defendant entered pleas of not guilty and not guilty by reason of insanity. The trial was bifurcated into two phases: one to determine defendant's guilt and one to determine defendant's sanity at the time of the shooting. Following the conclusion of the evidence presentation in the guilt phase, the jury received instructions on two theories of first-degree murder – premeditation and deliberation (§ 187, subd. (a)) and discharging a firearm from a motor vehicle (§ 189). The jury found defendant guilty of first-degree murder, with a true finding on the related firearm-use sentence enhancement. Following the conclusion of the evidence presentation in the sanity phase, the jury found that defendant was not legally insane at the time he committed the murder. Defendant does not challenge any aspect of the sanity phase, and accordingly, we recount only the evidence elicited at the guilt phase.

A. Prosecution's Case in Chief

The victim, victim's girlfriend, and their child lived in a residence less than a mile from defendant's residence. Before the shooting, defendant went to the victim's home on two separate occasions. On each occasion defendant drove his motorized all terrain vehicle (ATV) to the victim's house. The first visit occurred in September or October of 2011, when at approximately 2:00 a.m., the victim and his girlfriend heard an ATV pull

up their driveway to a portion of a gate surrounding their property and crossing their driveway. The victim opened his front door and saw defendant standing on the walkway just outside the house. The victim and his girlfriend recognized defendant but never had any dealings with him. Defendant did not appear to be drunk, but looked "very unstable" and he was "mumbling." Defendant repeatedly referred to the victim as "Jamar," "telling him to get outside." The victim responded that his name was "Jamal," and that he did not know or have a problem with defendant. Victim's girlfriend threatened to call the police if defendant did not leave. Defendant walked back to his ATV and drove away. Approximately one month later, defendant returned to the victim's home at nighttime. The victim and his girlfriend heard defendant's ATV. The victim opened the front door and stood in the doorway. Defendant appeared sober and normal, and he apologized for his conduct on the earlier occasion. The victim accepted the apology, the men shook hands, and defendant left on his ATV.

On the day of the shooting, defendant visited several bars and a local gas station. Surveillance cameras at these various locations captured his activities. [2] Sometime after defendant departed a local bar at 9:42 p.m., the victim and his girlfriend heard an ATV approaching their house. Victim's girlfriend believed that defendant had once again come to their home on his ATV, and exclaimed, "[A]re you kidding me?" She looked outside and saw an ATV parked just off to the left of the gate that surrounded their property.[3] She grabbed the telephone in case she had to call the police. Meanwhile, the

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[2] The videos were shown to the jury. Defendant was first seen at one local bar at 3:58 p.m. and he stayed until 6 p.m. He was then seen driving in and getting off and on his ATV at a local gas station. Shortly after 6 p.m. he arrived at a second local bar and left at 8:45 p.m. He was then seen back at the first local bar at 9 p.m. and he departed at 9:42 p.m. The defense investigator testified that the surveillance videos provided by the prosecution showed that when defendant was at the gas station, he could be seen standing up on his ATV and backing out of a parking space. Defendant did not have any balance problems as he stood up on the ATV or any problems operating the ATV. The witness also testified that an ATV was a motor vehicle and fell under the category of a truck in the Vehicle Code.

[3] The jury was shown photographs of the victim's house and driveway, and defendant's ATV.

victim got dressed, ran outside toward the gate, and yelled, "[A]re you serious?" A second or two later, victim's girlfriend heard a gunshot and looked outside. She saw the victim running toward the front of their house and observed a "worried and scared" look on his face. A second gunshot was fired from the direction of the gate, and she saw "the flash of the bullet," "the flash of the gun." The victim fell to the ground, just as a third gunshot sailed past him and hit the house. By the time the third shot was fired, victim's girlfriend was crouched down and hiding behind a door, fearing that the shooter was going to shoot her too. A few seconds later, the ATV started up, backed down the driveway, and left the area. Victim's girlfriend ran toward the victim and simultaneously called 911. The first 911 call was recorded at 9:52 p.m. When the police officers arrived at the scene, victim's girlfriend informed them that she knew defendant was driving the ATV she had heard outside the house.[4]

Approximately 20 minutes after the shooting occurred, the police contacted defendant at his residence. The officers explained to defendant the reason for their presence. Defendant told them he had been home all night. Defendant did not show any signs of alcohol impairment, as his speech and communication were normal, and he was cooperative.[5] Defendant was detained, handcuffed and read his *Miranda* rights.

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[4] Victim's girlfriend did not testify that she actually saw defendant the night of the shooting. The victim died before the police arrived at the shooting scene. The prosecution's forensic pathologist testified that the victim had died from two high velocity rifle gunshot wounds. One bullet entered the victim's chest in the front, passing through his body, breaking his clavicle, and causing a contusion on his lung. A second bullet went along the side of the victim's head with such velocity as to cause "tremendous fracturing" of his skull and removal of part of his ear. The wounds were classified as "intermediate" to "distant" range.

[5] The police arranged for defendant's blood to be drawn. The analysis showed a blood alcohol content (BAC) of between .153 and .162 about three hours after the shooting, which suggested a BAC closer to .22 at the time of the shooting. Defendant's hospital records showed that on the day after the shooting, defendant was still under the influence of alcohol but showed no signs of alcohol withdrawal and an examination within four days of his hospital admission found that defendant had no mental health issues and he was not prescribed any medication.

During an investigation outside the residence where defendant was found, police officers found defendant's ATV parked under a covered porch near garage doors. The engine block and exhaust area of the ATV were warm to the touch, indicating it had been used recently, and the ATV's tires and footrest were wet and covered with mud. There were fresh tire tracks across the driveway coming from a road located adjacent to the driveway. The officers also observed a gun rack on the back of the ATV, suitable for carrying a rifle, and a rifle propped up against a wall near the ATV. In examining the rifle, the officers noted a grayish film at the end of the rifle barrel and smelled fresh gun power – indicating to them that the rifle had been recently fired. Forensic examination of the rifle yielded one latent print that matched defendant's left ring finger. In addition, bullets found in the rifle matched two expended rifle casings found on the portion of the driveway outside the gated area at the victim's home. A matching shell casing from a third gunshot was still in the rifle's chamber.

The prosecution also presented evidence of defendant's motive for the shooting. Defendant's estranged wife testified that before the shooting, she had separated from defendant and they were in the midst of marital dissolution proceedings. About a week before the shooting on the evening of January 17, defendant called his wife and asked her if she knew "Jamar up the road?" The wife did not know him, but defendant said he was "going to kick his ass." Three days later, defendant called his wife and left a threatening and graphic voicemail on her phone, accusing her of sexual conduct with that "mother fucker up the road." The following day, defendant called his wife and left a voicemail apologizing for his earlier voicemail. [6] Defendant's estranged wife also testified that on other occasions, defendant stated he believed the victim had informed law enforcement agents about defendant's marijuana growing activities.

[6] Victim's girlfriend testified that, as far as she knew, the victim did not know defendant's estranged wife, he never had an opportunity to be with defendant's estranged wife, and he was not having an affair with anyone.

B. Defense Case

Defendant did not testify, but presented his defense through the testimony of several witnesses and through cross-examination of prosecution witnesses. The defense evidence can be summarized as follows. Defendant was an alcoholic, experienced alcoholic blackouts, suffered from paranoia, and unreasonably believed that local residents and law enforcement agents were targeting him for growing and selling marijuana even though he last grew marijuana in the summer of 2010, about two years before the shooting. He also was depressed about his marital dissolution proceeding at the time of the shooting, missed his children, and acted bizarrely in the months preceding the shooting, including showing up on two occasions unannounced and extremely intoxicated at a female neighbor's house in the middle of the night.

After the shooting, a psychiatrist interviewed defendant relative to his mental state at the time of the shooting. The psychiatrist opined that defendant suffered from a delusional disorder "persecutory type," and his conduct would probably meet the standard for a diagnosis of "schizophrenia paranoid type." The psychiatrist also testified regarding defendant's statements relative to the charges against him. Defendant recalled every minute of the day of the shooting and described his activities, including what he had done that morning, that he drank whiskey at home and later at bars, and that he came home and fell asleep. He denied shooting the victim, and believed that given the quality of the evidence against him that he would be found not guilty. According to the psychiatrist, defendant unreasonably believed he had been under surveillance for about a year and a half because he was growing marijuana, and, in some way, he had been framed for the shooting by Police Officer Peter Hoyle, who was working for the Mendocino County Major Crime Task Force. The psychiatrist believed that Hoyle had reason to fear defendant because the officer was "still at the epicenter" of defendant's "delusional global belief system." Defendant told the psychiatrist that Hoyle had "put him (defendant) here. If I'm found guilty, you've killed me." The psychiatrist believed defendant was dangerous even if his beliefs about Hoyle were not true.

C. Prosecution's Rebuttal

The prosecution offered testimony and documentary evidence to counter defendant's evidence that he was suffering from a mental disease or defect and was intoxicated at the time of the shooting. A behavioral health evaluator testified that he saw defendant in October of 2011 concerning a mental health screening as part of the marital dissolution proceedings. At that time defendant's behavior and thought content were "unremarkable, " he expressed no intent or thoughts of hurting others, his emotional presentation was not unusual, his judgment, insight, reasoning, and impulse control were "fair," and his self-perception was "realistic." In addition, several witnesses testified that they saw defendant in the bars on the night of the shooting. Defendant did not appear to be intoxicated and his demeanor was "fine."

The prosecution also called Officer Peter Hoyle, who was assigned as a special agent to the Mendocino County Major Crime Task Force. Hoyle testified that defendant had never been under investigation by the Task Force and the officer did not recognize defendant. Nonetheless, on July 16, 2012, while defendant was in jail, after he had pleaded not guilty by reason of insanity, Hoyle received a telephone call from defendant. Defendant identified himself and threatened to kill Hoyle.[7] Hoyle also testified that he had previously been a traffic officer, and an ATV was a motor vehicle under the Vehicle Code.

DISCUSSION

I. Trial Court Correctly Instructed The Jury That The Term "Motor Vehicle," As Used in Section 189, Includes A Motorized All Terrain Vehicle

During a jury instruction conference with the parties, the trial court granted the prosecutor's request to instruct the jury, in pertinent part, on the elements of first-degree murder under the theory of discharging a firearm from a motor vehicle (§ 189). The instruction read as follows: "The defendant is guilty of first degree murder if the People have proved that the defendant killed another person by shooting a firearm from a motor

[7] The telephone call was recorded and the recording was played for the jury.

vehicle. The defendant committed this kind of murder if: [¶] 1. He shot a firearm from a motor vehicle; [¶] 2. He intentionally shot at a person who was outside the vehicle; and [¶] 3. He intended to kill that person. [¶] A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. [¶] *A motor vehicle, as used in this instruction, includes a motorized all terrain vehicle*." (Italics added.)

Defendant now contends the trial court committed prejudicial error when it advised the jurors that the term "motor vehicle," as used in the murder instruction, includes a motorized all terrain vehicle. [8] In particular, defendant argues that the 1993 amendment of section 189, adding first-degree murder perpetrated by means of discharging a firearm from a motor vehicle "at another person outside the vehicle," reflects a legislative intent that the perpetrator be "inside" the vehicle at the time of the discharge. From this limitation defendant extrapolates that it necessarily follows the motor vehicle used to perpetrate the crime under section 189 must be "sufficiently enclosed to demarcate an 'inside' versus an 'outside, ' " and a motorized all terrain vehicle does not meet the statutory requirement because it is an open vehicle with no inside or outside. We disagree. As we explain more fully below, defendant's proposed construction of the language in section 189 is unreasonable in light of the common and reasonable definition ascribed to the term "motor vehicle" and the rather obvious purpose for which the Legislature amended section 189.

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*People v. Trevino* (2001) 26 Cal.4th 237, 240 [109

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[8] In the trial court defendant did not object to the instruction on the ground that he now asserts on appeal. Nonetheless, "[d]efendant's claim . . . is that the instruction is *not* 'correct in law,' and that it violated his right to due process of law; the claim therefore is not of the type that must be preserved by objection." (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; see § 1259 ["[t]he appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].)

Cal.Rptr.2d 567, 27 P.3d 283] [(*Trevino*)]; *People v. Gardeley* (1996) 14 Cal.4th 605, 621 [59 Cal.Rptr.2d 356, 927 P.2d 713].) To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. (*Trevino*, at p. 241; *Trope v. Katz* (1995) 11 Cal.4th 274, 280 [45 Cal.Rptr.2d 241, 902 P.2d 259].) When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

As stated above, in 1993, the Legislature amended section 189 to provide that first-degree murder now includes murder "perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death." (Stats. 1993, ch. 609, § 1, p. 3265, ch. 611, § 4.5, p. 3507.) The Legislature did not expressly define the term "motor vehicle." However, in the absence of any facial ambiguity of which we see none, we conclude the Legislature was aware and intended the term to have its reasonable and plain meaning. At the time of the 1993 amendment, the courts had held that in California "any vehicle is a motor vehicle if it is capable of moving from place to place under its own power." (*People v. Jordan* (1977) 75 Cal.App.3d Supp. 1, 11.) "This common understanding of what constitutes a 'motor vehicle,' . . . is consistent with pertinent statutory definitions" in the Vehicle Code. (*People v. Bostick* (1996) 46 Cal.App.4th 287, 295 [conc. opn. of Kline P.J.] [discussing meaning of the term "motor vehicle" as that term is used in section 12022.55, imposing sentence enhancement where defendant inflicts great bodily injury or death of person, other than an occupant of a motor vehicle, as a result of discharging a firearm from a motor vehicle in the commission of a felony or attempted felony] (*Bostick*); see Veh. Code, § 415, subd. (a) [defining "motor vehicle" as "a vehicle that is self-propelled"]; Veh. Code, § 111 [defining an "all terrain vehicle" as a type of motor vehicle having

certain characteristics].)[9] Thus, we conclude the plain meaning and only reasonable interpretation of the term "motor vehicle," as used in section 189, includes a motorized all terrain vehicle, which is a motor vehicle as defined in Vehicle Code section 415.[10]

Defendant contends, however, that even assuming a motorized all terrain vehicle meets the definition of a motor vehicle as defined in Vehicle Code section 415, the Legislature clearly intended to limit the reach of section 189 to an enclosed vehicle that provides the shooter with some measure of protection or cover. His argument is premised on the explicit language in section 189 that the target person must be "outside the vehicle," which, he argues, "carries an unequivocal indication [or] . . . necessary implication that the motor vehicle used by the defendant be constructed in a manner that differentiates between inside and outside. . . ." We conclude defendant's argument is unavailing. His proposed restricted construction of the term "motor vehicle" finds no support in the statutory language in section 189. The phrase "outside the vehicle" clearly

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[9] Although not dispositive, we find further support for our conclusion by an examination of the Legislature's use of the identical language at issue here when it amended section 190.2, to enhance the penalty for first-degree murder if certain special circumstances are found by the jury. (Stats. 1995, ch. 478, § 2, pp. 3564-3566; see *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, 486 [we generally construe "identical words in different parts of the same act or in different statutes relating to the same subject matter" as "having the same meaning"].) One of the special circumstances added to section 190.2, includes: "The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, 'motor vehicle' means any vehicle as defined in Section 415 of the Vehicle Code." (§ 190.2, subd. (a)(21).)

[10] When the Legislature amended section 189 in 1993, it did not define the term "motor vehicle," albeit it clearly knew the term was defined in Vehicle Code section 415. Having made no reference to the Vehicle Code in section 189, a reasonable assumption could be made that the Legislature did not intend to limit the application of the section to only those situations where a shooter discharged a firearm from a motor vehicle as defined in Vehicle Code section 415. (See *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1637.) Nonetheless, our resolution of this appeal does not require us to now address and we express no opinion on whether section 189 would apply where a shooter discharged a firearm from a motor vehicle that did not meet the definition of a motor vehicle under Vehicle Code section 415, if there are any such motor vehicles.

relates to the spatial relationship between the target victim and the motor vehicle. The phrase "discharge from the motor vehicle" clearly relates to the location from which the shooter discharges the firearm. Neither of these references, when reasonably interpreted, are susceptible of the cribbed interpretation defendant attempts to ascribe to them. If the Legislature had intended to limit the type of motor vehicle, as defendant suggests, "it could easily have said so. But it did not use any such language . . . ." (*People v. Johnson* (2015) 60 Cal.4th 966, 991.) "We must interpret the statute according to its terms because ' "the words the Legislature chose are the best indicators of its intent." ' (*People v. Ramirez* (2010) 184 Cal.App.4th 1233, 1238 [109 Cal.Rptr. 3d 474].)" (*People v. Cook* (2015) 60 Cal.4th 922, 933.)

We see nothing in the legislative history or Governor Wilson's signature message issued on the enactment of the amendment to section 189 that would support defendant's restricted definition of motor vehicle as that term is used in section 189. The purpose of section 189, simply put, is to punish more harshly the perpetrator who kills someone in a public area by shooting at them "from a motor vehicle." (Legis. Counsel's Dig., Sen. Bill No. 310 (5 Stats. 1993 (Reg. Sess.) Summary Dig., p. 236.) As noted by our colleagues in Division Two, "firing a gun from a motor vehicle is an especially treacherous and cowardly crime. It allows the perpetrator to take the victim by surprise and make a quick escape to avoid apprehension . . . ." (*Bostick, supra,* 46 Cal.App.4th at p. 292.) " '[D]rive-by' shootings . . . may well have provided the impetus" for the amendment to section 189. (*Bostick, supra,* at p. 292.) But, that said, the statute does not even refer to "drive-by" shootings and does not require that the shooting take place while the motor vehicle is in motion. Instead, the statutory text merely prohibits "the use of a motor vehicle as a staging ground for shootings which cause death . . .," which "is a greater evil which the Legislature could and did attempt to deter through the clear language of the statute." (*Ibid.*)

Defendant argues, however, that his restricted definition of the term "motor vehicle" gives meaning to all words used in section 189, and to construe the statute otherwise, would render certain portions of the statute meaningless in violation of the

principle that a statute should be constructed to give meaning to all its terms. We cannot agree. The rules regarding interpretation of statutory language are "only a guide and will not be applied if [they] would defeat legislative intent or produce an absurd result." (*In re J.W.* (2002) 29 Cal.4th 200, 209.) "In the end, a court must adopt the construction most consistent with the apparent legislative intent and most likely to promote rather than defeat the legislative purpose and to avoid absurd consequences." (*Id.* at p. 213.) An acceptance of defendant's restricted definition of the term "motor vehicle" would both defeat the purpose of the statute and lead to absurd results. For example, in common parlance, we say that a person sits "on" or "astride" a motorcycle, and not in or inside the motorcycle. Yet, no reasonable argument could be made that section 189 would not apply to a shooter discharging a firearm from a motorcycle with the intent to kill a person on the street or road on the ground that the motorcyclist does not sit "in" or "inside" the motorcycle. We therefore must reject defendant's contention that section 189 requires that the shooter discharge a firearm from a motor vehicle, which can only be described as having an "inside," such as a car or truck.

In sum, we conclude section 189 unambiguously applies to a defendant who discharges a firearm from a motor vehicle, regardless of whether or not it can be said the shooter was "in" or "inside" the motor vehicle. Even assuming any ambiguity, "[t]he legislative history, the purpose of the statute, general public policy concerns, and logic all favor an interpretation" of the term "motor vehicle," as used in section 189, to include a motorized all terrain vehicle. (*People v. Manzo* (2012) 53 Cal.4th 880, 889.) Consequently, the trial court's instruction to the jury is a correct statement of the law. Accordingly, defendant's claim of error fails. [11]

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[11] Neither *People v. Licas* (2007) 41 Cal.4th 362, nor *People v. Varela* (2011) 193 Cal.App.4th 1216, cited by defendant, support his restricted definition of the term motor vehicle as used in section 189. (See *People v. Jennings* (2010) 50 Cal.4th 616, 684 [a case is not authority for propositions not considered by the court].)

II. Sufficiency of Evidence to Support First-Degree Murder Conviction

Defendant also argues that there was insufficient evidence to support either an instruction or a verdict on first-degree murder based on the theory that he discharged his rifle from his ATV. However, even assuming merit to the argument, California law does not mandate reversal on this ground. Under California law, when a jury is purportedly presented with both factually supported and unsupported grounds for conviction, reversal is only required if the defendant demonstrates that "the verdict actually did rest on the inadequate ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*).) We conclude defendant has failed to meet his burden.

Here, the jury was provided with two theories of first-degree murder – premeditation and deliberation and discharging a firearm from a motor vehicle. Defendant makes no argument that there was insufficient evidence to support a verdict of first-degree murder based on the theory of premeditation and deliberation, nor could he. "A first degree murder conviction [based on premeditation and deliberation] will be upheld when there is extremely strong evidence of planning, or when there is evidence of motive with evidence of either planning or manner [of killing]. (*People v. Anderson* (1968) 70 Cal.2d 15, 27 [73 Cal.Rptr. 550, 447 P.2d 942] [(*Anderson*)]; see *People v. Thomas* (1992) 2 Cal.4th 489, 517 [7 Cal.Rptr.2d 199, 828 P.2d 101] [*Anderson* provides framework or guidelines typically used to evaluate evidence of premeditation and deliberation].)" (*People v. Romero* (2008) 44 Cal.4th 386, 401 (*Romero*).) The record here contains evidence from which the jury could reasonably find motive, planning and deliberation, and manner of killing. Believing that he was aggrieved by the actions of the victim, defendant's conduct of arming himself with a rifle and shooting at the victim - once in the shoulder area and a second shot in the back of the head as the victim fled - was not impulsive, but "demonstrate[d] a choice and plan of conduct inconsistent with a conclusion that [defendant] did not premeditate [and deliberate] the killing." (*People v. Morris* (1959) 174 Cal.App.2d 193, 197; see *Romero, supra,* at p. 401 [court upheld first-degree murder based on premeditation and deliberation where defendant brought weapon to a crime location showing planning activity, evidence of motive was killing rival gang

member, and victim killed by a single gunshot to the back of the head, with no signs of a struggle].) Thus, even if the evidence was factually insufficient to support a first-degree murder conviction on the theory of discharging a firearm from a motor vehicle, a reversal is not required in this case. "The jury was as well equipped as any court to analyze the evidence and to reach a rational conclusion." (*Guiton, supra,* 4 Cal.4th at p. 1131.) In the absence of an affirmative demonstration to the contrary, we presume "[t]he jurors' 'own intelligence and expertise . . . save[d] them from' the error of giving them 'the option of relying upon a [purportedly] factually inadequate theory.' ([*Griffin v. United States* (1991) 502 U.S. 46, 59.])" (*Guiton, supra,* 4 Cal.4th at p. 1131.)

We also see no merit to defendant's contention that reversal is required because he was prejudiced by the prosecutor's heavy reliance in his closing argument on the theory of murder based on the discharge of a firearm from a motor vehicle. Specifically, defendant asserts the prosecutor "overstated the actual evidence of the discharge from a vehicle throughout his argument," and urged the jury to consider that, "If you find that the evidence is reasonable and it concludes that he was shooting from the ATV, then you don't even get into the question of premeditation/deliberation, though you do have to have an intent to kill. You do have to do that. [¶] If you find these elements have been met, the defendant is guilty of first-degree murder and you don't even have to worry about premeditation/deliberation. You don't have to worry about second-degree murder." According to defendant, "the jury likely acceded to the prosecutor's exhortation" to convict on the theory of discharging a firearm from a motor vehicle to the exclusion of the theory of premeditation and deliberation. However, defendant reads the prosecutor's remarks too narrowly and out of context. The record shows that the prosecutor unquestionably concentrated on both theories of murder. For example, in his initial closing argument, the prosecutor noted that "[p]rimarily a lot of the evidence is focused on . . . premeditation and deliberation," and he extensively reviewed for the jury's assessment the evidence supporting a verdict on that theory. More significantly, defendant ignores the prosecutor's concluding rebuttal remarks in which he urged the jurors that if they found the evidence did not show defendant was shooting from his ATV

when he shot the victim "or if you don't want to go there, the evidence is just not beyond a reasonable doubt, it is overwhelming that this defendant premeditated and used this rifle right here (indicating), which the defense does not contest was the rifle, to murder a man that had nothing coming, had no reason to be murdered."

"In determining whether there was prejudice," we examine the entire record, "including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. [Citation.] . . . [I]nstruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict." (*Guiton, supra*, 4 Cal.4th at p. 1130.) In this case we conclude that a review of the record does not "affirmatively demonstrate[] a reasonable probability that the jury in fact found defendant guilty" of first-degree murder solely on the theory that he discharged a firearm from a motor vehicle. (*Ibid.*) Accordingly, we conclude defendant's claim of error fails.

III. Prosecutor's Closing Argument Was Not Prejudicial Misconduct

Defendant further contends he was deprived of his rights to due process and a fair trial by the prosecutor's closing argument in which the prosecutor urged the jury to consider defendant's demeanor in the courtroom as evidence of his guilt. We conclude defendant has failed to show any prejudicial misconduct requiring reversal.

A. Relevant Facts

During his initial closing argument and without objection by defense counsel, the prosecutor asked the jury to consider whether defendant's ability to premeditate and deliberately kill someone was demonstrated by the telephone call that defendant made from jail to Officer Hoyle after the shooting. The prosecutor continued, "Now, part of this could be a game. Certainly there's that side of it. And the game could be that on July 13th he entered his not guilty by reason of insanity and then three days later he starts calling the center of his universe to say that I'm going to kill you. It's interesting he

didn't have that motivation or need from January 25th, say, up until July 16th. [¶] And what's interesting is here at least Satan's partner, Officer Hoyle, in the courtroom and the defendant, no big reaction. He's here. Okay. Let's listen to what he has to say. [¶] So we have this death threat being made. So this gives you some insight. Does the defendant have the ability to form the intent to kill? Listen to that tape. Does he have the ability to think about it, to premeditate and deliberate? Listen to that call. The answer is yes."

Following the conclusion of the prosecutor's initial closing argument, the court recessed the trial after reminding the jurors "not to discuss the case or form or express any opinions about it." Before the trial reconvened and outside the presence of the jury, the court informed counsel that a juror had sent a note, asking, "Should the jury consider the defendant's courtroom demeanor in their deliberations ?" The court believed the juror's question may have been prompted by the fact that the jury had been told during voir dire that this was a two-phase trial, one phase to resolve defendant's guilt, and if necessary, a sanity phase. The court advised counsel that at the end of closing arguments, it would answer the juror's question, "No," and instruct the jurors not to consider defendant's courtroom demeanor in "this stage of the proceedings," to wit, the guilt phase. Defense counsel made no objection to the manner in which the court indicated it would handle the juror's question.

Following the resumption of the trial, defense counsel gave his closing argument, addressing defendant's courtroom demeanor in the following manner: "[The prosecutor] in argument says, all right, the defense position is Mr. Norbury has this paranoid schizophrenic fear of Mr. Hoyle, how come he didn't react when Mr. Hoyle was here and the defendant was there? Well, there are a lot of reasons. He may have been told to be on good behavior. There were officers in the room. And he has a leg restraint. You may have noticed. I don't know if you've seen him walk, but he walks funny because he has a leg restraint. So he may not have reacted to Hoyle for some reason other than this notion that Mr. Norbury has a mental disease or defect, which causes him to be – react the way he did. There may be another reason why he didn't react."

Once closing arguments concluded, the court immediately advised the jury: "I do want to briefly answer one juror question that was submitted at a break. I've discussed it with the lawyers. [¶] That is, should the jury disregard or consider the demeanor of the defendant during the trial? [¶] And the answer to that is the jury should not consider the demeanor of the defendant during the trial. They should disregard it. They should not consider it."

Following the return of the verdict in the guilt phase, the court met with counsel to discuss the sanity phase. During a discussion on jury instructions, the court and counsel put on the record earlier discussions had with regard to the juror's note concerning consideration of defendant's courtroom demeanor at the guilt phase. Defense counsel asserted he did not feel he had had sufficient time to object to the prosecutor's comment when it was originally made, and he "felt compelled to respond to" and "argue that point" in his closing argument. In response, the trial court stated that when it had received the juror's note concerning defendant's courtroom demeanor, which had "come up very briefly in the prosecutor[']s argument," the court had discussed the matter with counsel before defense counsel's closing argument. At that time it was the court's preference that neither counsel further discuss defendant's courtroom demeanor during their closing arguments. However, when defense counsel said he needed to or "felt compelled" to mention the matter in his closing argument because it had been mentioned by the prosecutor, the court agreed and the prosecutor lodged no objection.

B. Analysis

The parties agree, and we concur, that the prosecutor committed misconduct by asking the jury to consider defendant's courtroom demeanor during the guilt phase. (See *People v. Boyette* (2002) 29 Cal.4th 381, 434; *People v. Heishman* (1988) 45 Cal.3d 147, 197.) The parties disagree as to whether the misconduct was prejudicial. As we now discuss, we conclude the prosecutor's brief reference to defendant's courtroom demeanor does not require reversal.

As noted, the reference to defendant's courtroom demeanor was made during the prosecutor's initial closing remarks. Once the prosecutor's remark was brought to the

attention of the court, by way of a juror's note, the court informed counsel of the manner in which it would handle the issue. Thereafter, defense counsel responded in his closing argument and placed the prosecutor's improper comment "in a light that was more likely to engender strong disapproval than result in inflamed passions against" defendant. (*Darden v. Wainwright* (1986) 477 U.S. 168, 182.) The court then explicitly reinforced defense counsel's argument by its specific admonition to the jurors that they were not to consider defendant's courtroom demeanor, which admonition we presume the jury obeyed in rendering its verdict. (*People v. Stanley* (1995) 10 Cal.4th 764, 837.)

There is nothing in the record that supports defendant's contention that at the time the juror sent the note to the court the jury had already considered and debated the matter. The note was from a single juror and given to the court during a recess - after the court had admonished the jurors "not to discuss the case or form or express any opinions about it" and before defense counsel's closing, the prosecutor's rebuttal, and deliberations. Nor does the record support defendant's contention that at the time the juror sent the note to the court some of the jurors had taken the view that defendant's courtroom demeanor revealed a deficiency in his defense. The note indicates the juror was unsure as to whether it was appropriate to consider the prosecutor's comment regarding defendant's courtroom demeanor. The trial court's response clarified that defendant's courtroom demeanor was not to be considered by the jury, thereby dispelling any potential prejudice arising from the prosecutor's comment. (See *People v. Avila* (2006) 38 Cal.4th 491, 575 [incriminating testimony "did not prejudice defendant because the court admonished the jury not to consider it for any purpose against defendant, and we presume the jury followed the instruction"].) If defendant thought that any juror's ability to perform his or her duties had been compromised by the prosecutor's comment or that the court's admonition was insufficient, he could have sought a mistrial or a new trial after the verdict. Defendant does not now "explain in what manner the court's admonition was erroneous" or insufficient to cure any potential prejudice, and we see none. (*People v. Jennings* (1991) 53 Cal.3d 334, 385.)

DISPOSITION

The judgment is affirmed.

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.